

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

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UNITED STATES OF AMERICA )

Plaintiff, )

vs. )

EARNEST JAMES UJAAMA, )

Defendant. )

AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON DEPUTY  
BY

Case CR02-283R

December 11, 2002

2:35 p.m.

**ORIGINAL**

TRANSCRIPT OF PROCEEDINGS IN CHAMBERS  
BEFORE THE HONORABLE BARBARA J. ROTHSTEIN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

On Behalf of the United States: GEORGE Z. TOSCAS  
TODD GREENBERG  
ANDREW HAMILTON  
Attorneys at Law

On Behalf of the Defendant: ROBERT S. MAHLER  
(Defendant Not Present) PETER OFFENBECHER  
Attorneys at Law

On Behalf of Bureau of Prisons: DOUGLAS S. GOLDRING  
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Proceedings recorded by mechanical stenography; transcript  
produced by computer.



CR 02-283 #53

53

1           Seattle, Washington; Monday, December 9, 2002; 2:35 p.m.

2           THE COURT: Okay, guys. It looks like you really have  
3 done some wonderful--did you work all night or what?

4           MR. TOSCAS: Three straight days.

5           THE COURT: You really accomplished a tremendous  
6 amount. I mean, things that I thought you were coming back to  
7 me on, I think you've done an admirable job. I hope--quite  
8 frankly, you may have set some nice new ground rules for other  
9 cases, so people don't have to quite fight for days. There's  
10 some good stuff.

11          Let's go--there are three left. Right?

12          MR. MAHLER: Actually, Your Honor, Mr. Toscas pointed  
13 out an oversight we all made despite the 9,264 times we've  
14 reviewed various drafts. George, there is one provision that we  
15 all agree to. And, George, you can just read that.

16          MR. TOSCAS: Your Honor, I believe that this would fall  
17 in Section 2 under legal visits and would probably be  
18 Subsection D, as in David. And the language that we would  
19 propose would be--and I can write this out and provide it to the  
20 Court; all I have is a handwritten copy--Mr. Ujaama's counsel,  
21 pre-cleared co-counsel, investigators and paralegals shall not  
22 disseminate the contents of Mr. Ujaama's communications to third  
23 parties except as necessary for the purpose of preparing the  
24 defense.

25          It's a similar provision that is in the telephone and the

1 mail portions of the protective order. But we overlooked  
2 somehow--

3 THE COURT: Well, you're going to have to do this over  
4 anyhow. Fine.

5 Okay. So let's go to the first one--am I right? There are  
6 just three?

7 MR. MAHLER: That's right.

8 THE COURT: The first one--how do you want to do this?  
9 Do you want to give me just brief arguments, or do you want me  
10 to just--

11 MR. MAHLER: Yeah. I think if we could just restate  
12 our positions. This is a dispute that we aired out in court the  
13 other day. I don't think the parties' positions have changed.

14 Our objection to the government's language is that this is  
15 the exact language that the warden used initially to exercise  
16 discretion to prohibit contact visits.

17 We'd like something that's more specific, more particular,  
18 that sets out that it's the Court's order that contact visits  
19 shall happen unless the warden is aware of some specific  
20 information that he needs--or that he has that should cause him  
21 to prohibit contact.

22 So that's our position.

23 MR. TOSCAS: Your Honor, as we stated the other day in  
24 open court, the proposed language that we advance is the policy  
25 at the Bureau of Prisons that applies to all inmates. And what

1 we're seeking to avoid is having a policy that applies to  
2 700-plus inmates in an institution and another policy that  
3 applies--or another standard, I should say--that applies to  
4 Mr. Ujaama. I think that we may all be able to agree that  
5 circumstances that would satisfy defense proposed language would  
6 also satisfy the government's proposed language. And--

7 THE COURT: But the other way around isn't true.

8 MR. TOSCAS: I think it is true.

9 THE COURT: Well, I would say--I would agree with you  
10 and perhaps defense might even have agreed with you, if it  
11 weren't for the fact that it was in the exercise of "sound  
12 correctional judgment" that they denied contact visits in the  
13 first place. And upon closer scrutiny, i.e. when they came  
14 before the Court and you all had to actually give a reason for  
15 it, there wasn't any reason for it.

16 MR. HAMILTON: Your Honor, if I could address the  
17 Court. When there was a problem, defense counsel contacted us.  
18 We went to work with the SeaTac facility with the warden. We  
19 even went to the Department of Justice. I believe the Bureau of  
20 Prisons talked to the warden.

21 And that problem went away.

22 THE COURT: You know, it still hasn't gone away in  
23 general. In this facility, in this district, and--

24 MR. HAMILTON: I understand what the court's saying.  
25 But it has gone away with respect to this.

1 THE COURT: Yes. But you know my concern. The concern  
2 I have is that defense counsel shouldn't have to be going to the  
3 government, hat in hand, to say: We need to talk to our client.

4 Now, it's true that--you know, I know you, Mr. Hamilton and  
5 I'm getting to know Mr. Toscas. And I know that if they go to  
6 you and say this personally, if the Court goes to you and says  
7 it, it will be worked out. But they shouldn't have to do that.

8 And I have to go with--let's say the Court can take judicial  
9 notice of other problems that we're having at this very same  
10 institution. And I am not terribly impressed with the sound  
11 correctional judgment that is being used there not only in this  
12 case on one time, but in other cases. You know and I know there  
13 have been--you may not know this, Mr. Toscas, but there have  
14 been problems. And I don't think that the "sound correctional  
15 judgment" is always what I would want to use as a yardstick.

16 Now, I guess I'm not happy with specific information,  
17 either. Okay? So I was kind of hoping you guys would find a  
18 middle ground. And maybe--

19 MR. HAMILTON: We could come back to this, if the Court  
20 wants to. This is something that we've danced around for three  
21 days.

22 THE COURT: I understand. And I'm not being very  
23 helpful, because I've had it for three minutes.

24 MR. HAMILTON: And the problem is--I mean, I understand  
25 where counsel's coming from. And the Court alluded to this at

1 one of our hearings. This document is a precedent-setting  
2 document. And while the four of us representing the government  
3 sitting here can live with this, we're not sure of the  
4 ramifications in Washington, D.C. And that's--

5 THE COURT: Okay. Let me address that for a minute.  
6 Because this is something that defendant's raised in his brief  
7 that we haven't really touched on, and I think maybe at some  
8 point we have to and maybe so we can get down to these last few  
9 things that you can't agree.

10 And that is how broad a brush you can paint with when you do  
11 this and who is the defendant we're dealing with in each case.  
12 Quite frankly, I have not had any showing to me in other than  
13 the broadest language, and I haven't asked for it because  
14 frankly I haven't--we're in such threshold questions, I haven't  
15 really thought it was necessary.

16 But I haven't had anything shown to me that we're dealing  
17 with a defendant here who's going to stick a pencil in  
18 somebody's eye or shave a spoon or something. I haven't had any  
19 of this. I don't have before me a defendant who has the notches  
20 in his belt that would make me worry about the kinds of things  
21 you're all worrying about.

22 He falls in a category that immediately makes one's antennas  
23 go up. There's no doubt about it. And any court would be  
24 foolish not to take into account that we are dealing with a  
25 category of cases that deserves special treatment. If it

1 didn't, we wouldn't be sitting here day after day parsing these  
2 words out. And I think defense counsel have recognized this,  
3 too. It would be foolish of them not to.

4 So when you say "precedent-setting," yes. It is  
5 precedent-setting. But I would trust it's not going to bind  
6 anybody. If we're a little more lenient with some of these  
7 clauses with Mr. Ujaama, that doesn't mean if you get a guy in  
8 here, you know, who you can show to a court has done something  
9 really, truly awful that they're going to be bound by anything  
10 we're doing here. They'll go a hundred percent in the other  
11 direction.

12 And if you want to make a showing to me at some point that  
13 you--and I don't know what information you have. They don't,  
14 either. But I'm the last one to know around this table.

15 But if you have something to show me that Mr. Ujaama has  
16 done something violent, truly violent along the lines we're all  
17 concerned about, I'd be more inclined to step further over. But  
18 I haven't seen it yet. Maybe I'll see it when the proof comes  
19 in.

20 But if the guy's just--so far, all I know is that he's been  
21 trying to buy some land. Now, that's not--he may have tried for  
22 the wrong people. But it's not the same as analogizing to  
23 somebody who tried to kill a judge and a jail guard. You see  
24 what I mean? There's a bit of a leap here.

25 MR. HAMILTON: Sure. I just wanted to clarify a couple

1 things. First of all, in terms of Mr. Ujaama the phrase that I  
2 use is he's--we don't have any evidence that he is a  
3 bomb-thrower. We do think he has a temper, we think he's been  
4 in fights, we think that he's swung on people.

5 THE COURT: Well, he's at least beat up his wife a  
6 couple times because they found that in court.

7 MR. HAMILTON: Had to take an anger management course  
8 in Tukwila.

9 THE COURT: I thought it was somewhere else.

10 MR. HAMILTON: Tukwila. Yeah. When I talk about  
11 precedent-setting, I mean in any terrorism case in the United  
12 States defense counsel, whether it's Boston, Chicago,  
13 San Francisco, wherever a terrorist suspect is arrested, this is  
14 the first thing that court is going to look at. This is  
15 precedent-setting nationwide.

16 Before--I mean, the first document we looked at was what the  
17 judge did in Boston with Richard Reid, because that pushed the  
18 envelope as it existed at that point in time. We've pushed the  
19 envelope with this. This is precedent-setting nationwide.  
20 People at DOJ--you're laughing at me.

21 THE COURT: I'm laughing because the envelope got  
22 pushed by the act. We are--I would describe it as pulling back  
23 from a pushed envelope. But it all depends on where you were  
24 sitting.

25 MR. HAMILTON: I suppose that's true. So the concern,



1 if I could just--the concern, the rub with this is that from a  
2 policy point of view, from the eyes of Department of Justice,  
3 they wouldn't know Tukwila if it ran over them in a car. They  
4 have no connection to this district.

5 But they look at this, and the thing that we're trying to  
6 avoid is the creation of a double standard. Where I think, as  
7 Mr. Toscas said, let's say there's 800 people at SeaTac and  
8 799 operate under one system. James Ujaama operates under a  
9 separate system.

10 MR. OFFENBECHER: But that's exactly what the SAM is.

11 THE COURT: But this isn't the SAM anymore. We're now  
12 in a protective order.

13 MR. MAHLER: Let me suggest--

14 MR. HAMILTON: Just one point.

15 All we're saying is as a matter of course, the prison has to  
16 have some flexibility and some discretion. And what I'm saying  
17 is the fear that counsel has is not going to be realized in this  
18 case. Because if anything happens, they have my cellphone.  
19 They will call me.

20 Now, I know they shouldn't have to. And I'm saying they  
21 won't have to. I'm saying this will never come about. But in  
22 the event for any reason it does, we'll cover it.

23 THE COURT: Okay. Why don't we add--

24 MR. HAMILTON: I didn't mean to cut you off.

25 THE COURT: Why don't we just add a sentence. I do

1 think--I've already expressed on the record how concerned I am  
2 if contact visits were cut off. I think Mr. Goldring has heard  
3 me. He's right here at SeaTac. He knows exactly how I feel  
4 about that. Mr. Hamilton has heard me. And he didn't even have  
5 to hear me; he would correct it anyway.

6 Why don't we just--I don't want him to be under a different  
7 set of regs than anybody else. I don't want it either going  
8 against him or going for him.

9 I think what might cure this is if we added a sentence to  
10 the government's proposed language and just say: In the event  
11 that--I'm not going to give you the exact language. What I want  
12 to say is: In the event that the institution terminates,  
13 abridges--no, that's bad--suspends, thank you, suspends  
14 Mr. Ujaama's right to contact visits, defense counsel shall  
15 immediately contact the Court and a hearing will be afforded  
16 promptly. Or something like that.

17 The fact of the matter is, Mr. Hamilton, I would trust  
18 they'd contact you before they'd contact the Court and get the  
19 whole thing resolved. But I will give a prompt hearing, an  
20 immediate hearing. Okay? And I don't think it's really going  
21 to come up, because I think you three--okay? Can you all live  
22 with that?

23 Problem, Mr. Toscas?

24 MR. TOSCAS: I think we could work out that language,  
25 obviously. We've worked out far more difficult language. But I

1 don't know--and I'd have to consult with Mr. Goldring. I don't  
2 know if technically we call it a "right" to contact visits.

3 MR. GOLDRING: I wouldn't call it a "right."

4 MR. TOSCAS: But: Shall not suspend legal contact  
5 visits unless--

6 THE COURT: You don't need the word "right" in there.  
7 I was just shooting from the hip here. Okay?

8 Okay. What is the reg--can you live with that?

9 MR. MAHLER: Yeah. I guess I will say what I was going  
10 to say.

11 You know, my sense was if the government's concern is about  
12 a standard different for Mr. Ujaama than for others, the  
13 language that I'd like to see is an additional sentence to the  
14 defendant's proposed version that says: Because of the warden's  
15 initial denial of contact visits in this matter, the Court  
16 believes that some other circumstance need be shown before  
17 contact visits are suspended, or something that takes this out  
18 of the mainstream.

19 So that when the lawyers in San Francisco, Boston,  
20 Philadelphia have their case, they can look at that language and  
21 say: Well, there was a preexisting problem here. So Ujaama's  
22 case is different. I still--I mean, I guess I still--

23 THE COURT: Well, that would cut--you see, if there  
24 were no problem, we wouldn't be fighting about this. And I  
25 assume that in another district they won't be, because they

1 won't have a history. So who cares?

2 I am concerned--I know you're concerned. We all have a  
3 reason for being concerned here. But I think let's assume for  
4 now that the message has gotten through. Okay? That, you know,  
5 I don't think SeaTac had seen a case like this before. Few  
6 courts had. And sometimes people overreact the first time  
7 around. And everybody overreacts these days about this sort of  
8 thing.

9 And they've gotten the message. Mr. Hamilton made a phone  
10 call; it all got cured. Let's not look under the bed for  
11 bogeymen. Okay? We'll have enough problems to deal with. If  
12 it comes back, you can always move to have me change that  
13 protective order. We need stronger language.

14 But I'm trusting that--Mr. Goldring is sitting here. He  
15 knows what we're all talking about. I don't think you're going  
16 to have any problem.

17 MR. MAHLER: All right. Thank you.

18 THE COURT: Unless there's specific information on  
19 which to base a reasonable belief.

20 MR. GOLDRING: In reality, Your Honor, if there was  
21 ever an instance that non-contact visits would become necessary,  
22 we'd certainly have specific information we'd be able to present  
23 to the Court at that time. I don't anticipate that ever coming  
24 up.

25 THE COURT: I would trust that they would. Because

1 they know you're going to come to the Court. If they know  
2 you're coming to the Court, they better have a good reason for  
3 doing it.

4 MR. HAMILTON: Can I just tell the Court when I first  
5 got the call from defense counsel about non-contact, I called  
6 the warden. I actually was able to speak with the warden.

7 And I just want to let the Court know, what he said to me  
8 was: Look, we have a guy that has just come into our prison.  
9 We don't know anything about him. He's charged with being a  
10 terrorist.

11 He said: This will probably change. And also, there was  
12 some type of--I think Mr. Ujaama was involved in an altercation  
13 while he was in Virginia. It may not have been his fault, but  
14 it was written up as an altercation over a newspaper.

15 MR. OFFENBECHER: The other guy got written up. He  
16 didn't get written up.

17 MR. HAMILTON: All I'm saying is the information came  
18 that there was an altercation.

19 He said: You know, in 30 days or so when I get to see the  
20 lay of the land, it may change. But right now in my sound  
21 discretion, I think it's necessary.

22 Now, we convinced him otherwise. But that's what he was  
23 operating on. I just wanted the Court to know that.

24 THE COURT: Okay. We all know that--I'm just telling  
25 you when you--how many times in this warden's lifetime do you

1 think he ever had a prisoner who was called a terrorist before?  
2 I would hazard a guess, zero.

3 MR. HAMILTON: There was Ressam. Well, Ressam was  
4 there before this warden came here.

5 MR. GOLDRING: And I think he was already well on his  
6 way to being found guilty by the time the warden got here.

7 THE COURT: It's not worth it, guys. Live with this  
8 language. If it doesn't work, if we have a problem with it, we  
9 can come back. And I'm not worrying about other districts right  
10 now.

11 MR. TOSCAS: One question that I had, and I hate to do  
12 this, because I may be--I may need Mr. Goldring to answer it.  
13 But one of the concerns that we had in maintaining the standard,  
14 as it applies to all people, is that on a given day for whatever  
15 reason, whether they're short on staff or they're having an  
16 exercise or a drill, on that one particular day they may have to  
17 say: Sorry, defense counsel. Today it's not non-contact for  
18 everybody. Or: Today it needs to be non-contact, because we're  
19 having an exercise or a drill or we're short on people today.

20 That's something that we tried to make--leave open, so that  
21 they could do it. But is that the type of--

22 THE COURT: They're not going to run to the Court with  
23 that.

24 MR. GOLDRING: And if they come to me with that on a  
25 day like that, I'll explain it to them.

1 MR. MAHLER: It's not an issue. I think we can move  
2 on.

3 MR. TOSCAS: All right. We can move on.

4 THE COURT: Okay. Actually, I think that's probably  
5 the least of our problems.

6 Okay. Let me ask Mr. Goldring, what is the usual situation  
7 with legal telephone calls?

8 MR. GOLDRING: The usual situation with legal telephone  
9 calls, and I guess I'll just start with saying a usual situation  
10 for an inmate in the Special Housing Unit where he's housed,  
11 they would make a request of their unit team and say: I need a  
12 legal telephone call on such-and-such a date or time that my  
13 attorney told me to call them. Or they'll say: I need a legal  
14 telephone call. Usually they'll put it in writing.

15 Typically their counselor, but sometimes another member of  
16 their unit team, they'll make every effort to come up within  
17 24 hours of having received the note and give them a legal phone  
18 call.

19 A few accommodations we made with respect to Ujaama  
20 specifically, because he was complaining it was taking too long  
21 for him to get calls, was we said: Okay, rather than him giving  
22 his notes to any staff member in the Special Housing Unit, only  
23 give it to a member of the unit team. And there is a member of  
24 the unit team making rounds through the Special Housing Unit on  
25 a daily basis, at a minimum.

1 And I said: And then if his counselor is not available, any  
2 member of the unit team can give him legal phone calls. We  
3 tried that for a little while--

4 THE COURT: I wasn't talking about that. I was talking  
5 about monitoring, recording or intercepting.

6 MR. GOLDRING: We never monitor, record or intercept  
7 legal phone calls.

8 THE COURT: To and from? Both ways?

9 MR. GOLDRING: Yes. We have two separate telephone  
10 systems. One is the inmate telephone system where they make  
11 their social calls. And they can call their attorney from  
12 there, and it would be monitored if they chose to call their  
13 attorney from that system. There's a big sign. They're all on  
14 notice this is a monitored telephone call.

15 If they choose to use the unmonitored system with someone in  
16 the Special Housing Unit, for example, they're brought to an  
17 area that has an outside line. In this case it's in the  
18 non-contact visitation room, because that's the only place that  
19 has an outside line in the Special Housing Unit that's not part  
20 of the inmate telephone system that they can use.

21 THE COURT: How do you make sure they're, in fact,  
22 calling their attorneys?

23 MR. GOLDRING: What happens is the counselor dials the  
24 phone. And when it connects, they say: Could I please speak  
25 with Bob Mahler? Bob Mahler gets on the phone, they verify that



1 and hand the handset of the telephone over to the inmate.

2 THE COURT: Okay. And when Bob Mahler calls  
3 Ujaama--well, say Bob Mahler calls Joe Smith.

4 MR. GOLDRING: Inmates can't receive incoming phone  
5 calls. They can only make outgoing phone calls.

6 THE COURT: So when you want to talk to Ujaama--

7 MR. MAHLER: I get in my car and drive there. Which  
8 takes half a day, if I want to spend 10 minutes with him.

9 THE COURT: Well, you better save up all your  
10 questions.

11 MR. HAMILTON: And we have the same problem. It kills  
12 our half day, also.

13 MR. OFFENBECHER: When you want to talk to Ujaama?

14 MR. HAMILTON: When we want to talk to Ujaama.

15 MR. MAHLER: I think we may need an amendment to this.

16 THE COURT: Well, that will take a little longer.

17 Okay. So why does the government object to this additional  
18 proposed language, if nobody else is having it done? Remember,  
19 we want to keep him just like everybody else.

20 MR. TOSCAS: Yes. First, Your Honor, the way the  
21 protective order was fashioned was that it would be an order  
22 that addresses the conduct of defense counsel first. And this  
23 would be straying away from that notion.

24 Number two, it is clear that not only is it Bureau of  
25 Prisons policy that they don't record attorney-client

1 conversations, but the SAM specifically states in no uncertain  
2 terms that attorney-client monitoring is not allowed. That  
3 would call for--would only be called for in an extraordinary  
4 circumstance, and there's only--you know, there's a part of the  
5 SAM that calls for or allows for the Attorney General to order  
6 such monitoring, and the SAM specifically says that it does not  
7 so authorize.

8 As a result, we believe that not only does the Bureau of  
9 Prisons policy cover it adequately, but the SAM makes perfectly  
10 clear that these calls are not to be recorded, monitored. It  
11 does not authorize attorney-client monitoring. And as such,  
12 there's no reason to add it into this order, which deals with  
13 defense counsel.

14 THE COURT: And why do you think you need it?

15 MR. MAHLER: Well, the first point, Your Honor, is the  
16 SAM--the protective order deals with more than just governing  
17 our conduct. It also deals with attorney-client communications.  
18 And the whole idea of the motion was to preserve our client's  
19 Sixth Amendment rights, as well.

20 I think that we've had problems as we described, and we've  
21 heard the government's rebuttal on that. But our--we heard our  
22 client's legal communications with us being overheard. You  
23 could--

24 THE COURT: Well, that's debatable, given the  
25 description.

1           MR. MAHLER: I understand. But we feel that having the  
2 Court enter an order that this court specifically believes that  
3 overhearing these phone calls or monitoring them or recording  
4 them, intercepting them in any way should be prohibited--we  
5 should have the right to a privileged conversation with our  
6 client by phone. It's important for us.

7           THE COURT: It is important. But so far as I can tell,  
8 it's provided for in the SAM which is directed to the  
9 institution. Right?

10          MR. TOSCAS: Yes.

11          THE COURT: I'm not going to--I don't know what  
12 happened. The description of what took place--this is with the  
13 glass and the room and whether you could hear and they could say  
14 "No" or whatever? Who else was there? I forget. Somebody was  
15 there who described it to me.

16          MR. TOSCAS: I and Mr. Goldring described it. Because  
17 I had asked Mr. Goldring about it, and he spoke to the  
18 correctional facilities employee who was actually there  
19 providing--walking him to and from his legal conference.

20          THE COURT: Okay. Let me tell you what. For now, I'm  
21 going to leave it out. If you go back there, you're not going  
22 back--you'll be going back there on, obviously, a lot of  
23 occasions--why don't you, one from each side, go in and one of  
24 you sit on one side and talk in a regular voice from a place  
25 where you'd be sitting on the telephone and one of you stand on

1 the other side and see if you can hear.

2 MR. GOLDRING: Your Honor, I've done that. I went up  
3 there with one of our lieutenants after I saw their complaint,  
4 and I did that and had her sit on one side of the glass and I  
5 sat on the other side where the counselors typically sit. You  
6 could hear noise coming from the other side, but you couldn't  
7 discern specific language unless you sat right up against the  
8 glass.

9 The other thing I've done is--and I haven't done this yet,  
10 but I am going to do. You can visually monitor--we're required  
11 to visually monitor the telephone call. You can do that from  
12 the other side of the glass. You can also do that from the  
13 hallway. And I'm going to tell the correctional counselor from  
14 now on--

15 THE COURT: Is there a TV in the hallway?

16 MR. OFFENBECHER: You can just look through the glass.

17 MR. GOLDRING: There's a glass in the doorway. I'm  
18 going to make sure she's in the hallway looking through the door  
19 to avoid any appearance of this problem occurring again.

20 THE COURT: Okay. That will work. Okay. I think you  
21 have the language in the SAM, and that should do it with this  
22 assurance. If you have any problems, you know where I am.

23 Okay. The last one I thought--the last one I thought we  
24 dealt with at the hearing. I can't remember what we came up  
25 with. Do you recall? I remember the government thinking that

1 there was some need to at least make sure that things weren't  
2 tucked away in the legal effects that weren't legal effects.  
3 And I think everybody agreed that they're not supposed to be  
4 reading his legal papers.

5 MR. MAHLER: That's the key issue here, Your Honor.  
6 Nobody disputes that they can thumb through, leaf through his  
7 legal effects to make sure there's nothing that would be  
8 dangerous or contraband in there. That's why we used the words  
9 "read or seize" his legal effects. What we want protection from  
10 is the institution or some employee of the institution taking  
11 his legal papers out and reading them. I don't see how that  
12 could possibly offend institutional security.

13 THE COURT: That's a tough one.

14 MR. TOSCAS: Well, first, Your Honor, again, I don't  
15 think that it's a minor point to say that this--such a provision  
16 deviates from the thrust of a protective order that, on its  
17 face, says this deals with conduct of defense counsel. I  
18 understand Counsel's response to that. But I believe that the  
19 remainder of the order is very well crafted to deal with defense  
20 counsel's concern.

21 However, in this instance it's clear that--or there is no  
22 claim that there's been a violation of this or that there is a  
23 problem thus far with employees of the institution reading such  
24 mail. On a--

25 THE COURT: Are we talking about mail now?

1 MR. TOSCAS: I'm sorry. Reading such material.  
2 Misused the word.

3 On a practical level, just based on what I've learned in the  
4 past few weeks of dealing with these issues and discussing how  
5 these institutions operate, on a practical level the people that  
6 are doing the cell searches really could not care less what the  
7 document says, as long as by flipping through it they realize  
8 it's not contraband or it's not an escape plan or something of  
9 that sort. They need to be able to flip through materials to  
10 ensure that they are what they claim they are.

11 And I assume--or I believe, I think maybe the inmates, some  
12 of the inmates use notebooks or folders, binder folders, that  
13 say Legal Materials so that they're clearly set out or set  
14 apart.

15 THE COURT: Okay. Now, we have around this table seven  
16 people--count my law clerk--eight people, all of whom have  
17 probably taken a large number of English lit courses, writing,  
18 maybe even before we went to law school some creative writing  
19 courses. Find me words without using the thesaurus that will  
20 say: In conducting cell searches, BOP and USMS personnel, while  
21 able to leaf through--

22 MR. TOSCAS: May I propose some language?

23 THE COURT: Are you getting help?

24 MR. TOSCAS: From the brains of the organization.

25 THE COURT: Mr. Greenberg--

1 MR. TOSCAS: In conducting cell searches, BOP and/or  
2 USMS personnel shall not read for content or seize Mr. Ujaama's  
3 legal effects. BOP and/or USMS may, however, review and inspect  
4 such materials for the limited purpose of confirming that the  
5 materials are legal effects.

6 THE COURT: How about that?

7 MR. OFFENBECHER: Well, the real problem with that is  
8 that if you're not--what does "review and inspect" mean? I  
9 mean, again--

10 THE COURT: They're going to do it, and they're going  
11 to have the right to do it.

12 MR. OFFENBECHER: They do under there. All we're  
13 saying is they can't read it.

14 THE COURT: No. This is not clear enough. Because  
15 "read and seize" doesn't say that they can at least--well, it  
16 does say the same thing. But what's wrong with--

17 MR. OFFENBECHER: "Review and inspect" means many  
18 things to different people. This will be interpreted by one of  
19 maybe 20 correctional officers who are now permitted to review  
20 and inspect Mr. Ujaama's legal effects.

21 MR. GREENBERG: For a limited purpose: just to  
22 identify as legal effects.

23 MR. GOLDRING: When we review any, for example, legal  
24 mail, the way our policy is written is we review and inspect the  
25 legal mail in the inmate's presence. And we open up the

1 envelope in front of the inmate, flip through it with the inmate  
2 to make sure everything is what it says it is, and then give it  
3 to him.

4 It would be basically the same process when we're going  
5 through his legal effects in his cell. We pick up whatever is  
6 determined to be legal materials, flip through it, review and  
7 inspect it to make sure it is what it says it is, and then put  
8 it back.

9 MR. MAHLER: Instead of "review and inspect," would you  
10 be satisfied with something that said: BOP personnel may  
11 conduct a cursory examination?

12 THE COURT: "Cursory" is good. How about "cursory  
13 examination," "cursory inspection"?

14 MR. GOLDRING: That's fine.

15 MR. MAHLER. So we say: Personnel shall not read for  
16 content or seize Mr. Ujaama's legal effects.

17 And then the second sentence?

18 MR. TOSCAS: BOP and/or USMS may, however, conduct a  
19 cursory examination of such materials for the limited purpose of  
20 confirming that the materials are legal effects.

21 THE COURT: Sounds good to me. Okay?

22 MR. TOSCAS. And obviously, if what he has marked  
23 as--just strike that--strike that.

24 MR. OFFENBECHER: Shall we put that in: Anything  
25 that's marked as attorney-client privileged?



1 THE COURT: No. No, no.

2 MR. TOSCAS: No.

3 THE COURT: They're going to look at it anyway.

4 They're not going to read it. They're going to give it a  
5 cursory examination. Because they even do that with--you see,  
6 we don't want to open Pandora's box on the mail.

7 MR. GOLDRING: Thank you.

8 THE COURT: But--I don't even want to ask if there's  
9 anything else, because I know you'll come up with something  
10 else.

11 MR. MAHLER: There's something else.

12 THE COURT: That's what I thought.

13 MR. TOSCAS: And I have something else, as well.

14 MR. MAHLER: Unrelated to the SAMs. The Court  
15 received a letter from Mr. Ujaama's grandmother.

16 THE COURT: I sent it to everybody.

17 MR. MAHLER: And as long as we have the pleasure of  
18 Mr. Goldring's company here today, I thought it would be a good  
19 opportunity to maybe address the issue of getting my client's  
20 grandmother and son in to see him.

21 We talked about it briefly before Your Honor came into the  
22 library. It's our understanding that under the SAMs, these  
23 people are not--

24 THE COURT: Why not? Well, wait a minute. Was this  
25 the same thing you were going to talk to me about?

1 MR. TOSCAS: No.

2 THE COURT: Why can't his grandmother see him?

3 MR. GOLDRING: The SAM defines immediate family members  
4 who are allowed to visit him, and "grandmother" is not--unless  
5 we--George?

6 THE COURT: Going to change the SAM? Here we go again.  
7 Do I have to incorporate them into the protective order? I  
8 mean, come on. Just change the SAM.

9 MR. TOSCAS: The protective order doesn't need to  
10 incorporate that. Let me get back to D.C., and obviously--

11 MR. MAHLER: And what?

12 MR. TOSCAS: I've told you we will be looking at  
13 ultimate revisions of the SAM, and we'll take care of that issue  
14 one way or the other.

15 THE COURT: No. Take care of it one way. There are  
16 going to be people--there are going to be people who come before  
17 you under a SAM. Let's take a little hypothetical case. The  
18 guy doesn't have a mommy and a daddy. Okay? He's been raised  
19 by his grandmother his whole life. Or his aunt. Or his foster  
20 mother.

21 MR. TOSCAS: We'll take care of it, Your Honor, I  
22 assure you.

23 THE COURT: If the SAM isn't going to be flexible  
24 enough to include a person's immediate family by who their  
25 immediate family is--what are you going to do with common-law

1 wives? Half the people I see in sentencing are living with  
2 women for 10, 15 years and they never marry.

3 MR. TOSCAS: Enough said. We'll take care of it.

4 MR. MAHLER: Which brings me to the next point that I  
5 didn't realize I had until a moment ago. That is, when can we  
6 expect to get the modified SAM? Because there were a number of  
7 modifications to the language of the SAM.

8 MR. OFFENBECHER: And, in fact, the negotiations  
9 surrounding the protective order depended on changes in the SAM.  
10 So they're kind of interlocking.

11 THE COURT: My message to you guys is I want to get  
12 these things signed and in place. You're spending valuable time  
13 that you should be spending--don't we have a June trial date of  
14 this year?

15 MR. MAHLER: Sure do.

16 MR. HAMILTON: Next year.

17 THE COURT: Well, you know what I mean. This June, not  
18 a year from June. This June.

19 Guys, that's only six months away. You've got to get  
20 started on something other than these things--okay. I don't  
21 want to imply that they're not important. Because you're  
22 absolutely right: They are precedent-setting, and they are  
23 groundbreaking. And a lot of the things we're doing here will  
24 probably save you a lot of time in other cases.

25 The fact that we now know "immediate family" has to be

1 subject to some kind of--once you talk in this case--I assume in  
2 the next case you'll just make a list and see who his--since we  
3 haven't had any "she's" yet--his immediate family is and you  
4 adjust accordingly.

5 Okay. When can we get the stuff signed?

6 MR. TOSCAS: The protective order I think can be--

7 THE COURT: Tomorrow?

8 MR. MAHLER: Oh, yeah.

9 MR. TOSCAS: We can have that language over to the  
10 Court possibly even by the end of the day. I don't know who has  
11 the final draft.

12 THE COURT: Tomorrow.

13 MR. TOSCAS: But as for the SAM, which I think is--

14 THE COURT: You want to take some time and read this.  
15 Because, remember, you guys missed that D. These things--every  
16 line has to be in there. So take your time and get it to me  
17 tomorrow.

18 What about the SAM?

19 MR. TOSCAS: The SAM, I don't know if--

20 THE COURT: Monday?

21 MR. TOSCAS: That's going to be difficult for me,  
22 because I lose a day going back. And--

23 THE COURT: You guys are in the wrong time zone.  
24 Tuesday? Remember, faxes.

25 MR. TOSCAS: I understand. I'm just trying to think of

1 the different levels of review that's going to be required. If  
2 I could have--if I could have until next Friday with the  
3 understanding that if at all possible I could get it done  
4 sooner, I absolutely will.

5 THE COURT: All right. As long as you guys can just  
6 put this aside and go on with the rest of the case. As long as  
7 you're comfortable, we're all comfortable with what the SAMs--I  
8 don't want him--let his grandmother visit him before next  
9 Friday. She wants to see him. This is Christmastime. You  
10 know, people have--if you can just take care of that part of it.

11 MR. MAHLER: How about could we just ask the Court to  
12 enter a minute order saying that the SAM is superseded to allow  
13 the grandmother to visit before Christmas?

14 MR. TOSCAS: Is all her paperwork filled out?

15 MR. GOLDRING: I don't think so.

16 MR. TOSCAS: That needs to be clear. The paperwork  
17 needs to be done, and BOP needs to have received it. Whatever  
18 the SAM says. If that's done and she's available for a visit  
19 within the next few days, we'll make that happen.

20 THE COURT: Let me say this. Mr. Goldring, will you go  
21 back--if the paperwork isn't done, give Mr. Mahler or  
22 Mr. Offenbecher a call immediately and say: If she says she's  
23 done it, we can't find it. Or: She hasn't done it. And let  
24 her do it over again. Get her to fill out the forms they need.  
25 And they'll arrange--

1 MR. GOLDRING: First thing tomorrow morning, I will  
2 verify which individuals have returned paperwork. And if we  
3 don't have paperwork from the grandmothers, I will contact  
4 Mr. Mahler.

5 MR. MAHLER: What about Karim, who is 12?

6 MR. GOLDRING: I don't think he needs paperwork, but he  
7 would have to be accompanied by an adult.

8 MR. GOLDRING: Is it both grandmothers?

9 MR. MAHLER: Both grandmothers would be good. The  
10 paternal grandmother was in town over Thanksgiving and wanted to  
11 visit and wasn't able to because of the SAM.

12 THE COURT: Okay. We're going to work on it. Okay? I  
13 think there was something in the letter that said she was coming  
14 up--or the implication was she might be coming up again for  
15 Christmas. If she is, she should be able to visit.

16 MR. GOLDRING: I'll look into it first thing in the  
17 morning.

18 THE COURT: But she'll have to do paperwork, too.

19 MR. HAMILTON: When we had our telephone conference and  
20 the Court entered a temporary order, one of the things the Court  
21 said was the mother gets to visit Mr. Ujaama. That happened.  
22 We don't oppose a similar type order.

23 I just want to make sure the Court is aware of the  
24 tremendous problems facing Mr. Toscas when he goes back to DOJ.  
25 There's only a set number of people in the Department of Justice

1 who have the authority to modify a SAM. It is a very elaborate  
2 procedure. He's going to be taking care of this, but it's not  
3 something like a phone call.

4 THE COURT: You don't want to tell me that,  
5 Mr. Hamilton. Because the stronger your argument is along those  
6 lines, the weaker your argument is for SAMs at all. Because one  
7 of the reasons we're having a protective order for some of these  
8 matters, rather than a SAM, is that I am reachable. You don't  
9 have to go through several levels. You can get a hearing  
10 probably within an hour or two, if you really need one. And if  
11 I'm not, there are six other judges around here.

12 But that's okay. I'm not backing off the fact that we have  
13 SAMs. But what you have to demonstrate to me is that you can  
14 work on a short turnaround, regardless of how few people there  
15 are there and regardless of the fact that they all may take off  
16 from December 23rd through January 7th or whatever they do back  
17 there when they--you know, if you tell me that without going  
18 through 60 different chains of command you can get somebody's  
19 mother and twelve-year-old son in to see them, that's good  
20 enough for me And for them.

21 MR. TOSCAS: And, Your Honor, I can say in the SAMs  
22 that have been implemented in the past, I think Mr. Hamilton had  
23 said to you in one of the first hearings on the SAM, this is a  
24 work in progress. I think he used that phrase.

25 What I've seen in reviewing the history of the

1 implementation of the less than 30 SAMs that have been ever put  
2 into place is that they are flexible enough to deal with issues  
3 like this that arise where defense counsel says: Hey, this  
4 provision says X We need it to say this.

5 And it's not, you know, a rigid policy that we say: No,  
6 we're going to deny access to certain family members.  
7 That's--the procedure as it existed in the past and as it exists  
8 now allow for changes like that. And those types of things will  
9 be worked out, and over time I'm sure that defense counsel--over  
10 time there may be other provisions that they say: Hey, can we  
11 tweak this? And those are things that we will work on as  
12 quickly as possible.

13 THE COURT: Well, you worked on--Mr. Hamilton was able  
14 to work on getting the mother to visit within 24 hours of my  
15 saying it.

16 (Discussion off the record.)

17 MR. TOSCAS: Are we done with that?

18 THE COURT: Yes. Grandma's going to get the visit.

19 MR. TOSCAS: Just have one other thing I wanted to  
20 mention. And defense counsel and those of us on the  
21 government's side have spoken about this, but I want to point it  
22 out for the Court's--so the Court knows what we've agreed.

23 Number 6 that deals with legal contacts states:  
24 Mr. Ujaama's legal telephone and visitation privileges shall not  
25 be suspended or eliminated without promptly providing notice to



1 defense counsel and raising the matter with this court.

2 We just wanted to point out on the record that under  
3 extraordinary circumstances and in an emergency situation or in  
4 a situation that applies to all inmates where legal visitation  
5 is shut down temporarily or not allowed on a particular day,  
6 those are not times where a person has the privilege anyway.  
7 For example, there was one day that due to an emergency  
8 situation no legal visitation was allowed at all, and there was  
9 a defense attorney at the door wanting to get in and they said  
10 across the board: We don't allow it. That is not the type of  
11 suspension of legal visits that is contemplated by that  
12 paragraph.

13 And defense counsel said they understand that, but I wanted  
14 to make sure it was clear and on the record for BOP's purposes.

15 THE COURT: We hear about those occasionally. If  
16 anything like that happens, whoever the defense counsel is, you  
17 don't have to let the Court know about it.

18 All right. I think we've taken care of it. So I'll get  
19 this sometime tomorrow, and I can sign this. And you don't have  
20 a problem with next Friday, as long as the visitation is going  
21 to take place with the grandmother? There's nothing in there  
22 that's going to--you need--I mean, we've got a workable thing  
23 going.

24 MR. MAHLER: Right.

25 THE COURT: You can all go work on something else now?

1 MR. MAHLER: I hope so. When you see the final, Your  
2 Honor, I'll just let you know that because of paragraph 1 that  
3 has an affirmation--has affirmation language in it, the final  
4 copy will have a signature page for the members of the defense  
5 team to sign that we've received it and we all agree to be bound  
6 by the Court's order.

7 THE COURT: Good. Okay. Anything else? I shouldn't  
8 ask. I know I shouldn't ask.

9 Okay, guys. So what's the next problem going to be?  
10 Discovery? Do we still need--

11 MR. OFFENBECHER: Access to those witnesses in  
12 Guantanamo Bay.

13 THE COURT: Do we all get to go?

14 MR. MAHLER: Want to go?

15 THE COURT: No. I want to go to Cuba. Supposed to be  
16 beautiful.

17 Wait. Do we still need a status conference?

18 MR. MAHLER: I think we do. There are a number of  
19 issues that we still have to resolve, and--

20 THE COURT: Mr. Toscas, you ought to get a room out  
21 here, an apartment or something. Do you stay in a hotel when  
22 you come out?

23 We can go off the record.

24 (Discussion off the record.)

25 MR. MAHLER: I expect it to be short, but I think there

1 are two or three things, carryovers--

2 THE COURT: You want to talk about them now?

3 MR. MAHLER: If I can do them from memory.

4 THE COURT: Well, don't--

5 MR. MAHLER: Actually--

6 MR. OFFENBECHER: We could sit down and pencil a few  
7 things out. Or do you want to go ahead?

8 THE COURT: Can you all do this now?

9 Are you still trying to catch a plane?

10 MR. TOSCAS: No, Your Honor. There's no planes after a  
11 certain hour until the red-eye, which I intend to take. So I'm  
12 good.

13 THE COURT: And let me tell you. I took one of those  
14 about a week ago, and they promised me that: Oh, the bonus of a  
15 red-eye is there's nobody else on it. You can stretch out and  
16 go to sleep.

17 That is not the case.

18 MR. TOSCAS: Used to be the case, but no longer. The  
19 last three times I left Seattle I took red-eyes. And  
20 unfortunately, mine are connections. So it makes it very  
21 difficult.

22 THE COURT: Aren't you going to D.C.?

23 MR. TOSCAS: Yes, I am. But going into National  
24 Airport in the times I needed to leave. And due to the space  
25 available, there just was no space available on the nonstops.

1 MR. MAHLER: Well, Peter was whispering in my ear--and  
2 I agree with him--we should probably do this when we're a bit  
3 more organized.

4 THE COURT: Okay. And you must have an agenda too,  
5 Mr. Hamilton.

6 MR. HAMILTON: We'll handle it without George.

7 THE COURT: So you want to get together Monday or  
8 Tuesday of next week?

9 MR. MAHLER: We had tentatively set Monday at 10:00.  
10 But I don't know if Ms. Tyree--

11 THE COURT: Oh, you better check with her.

12 MR. TOSCAS: Monday at 11:00. I had asked if I could  
13 appear by phone, if necessary.

14 THE COURT: Good. Okay.

15 (The proceedings concluded at 3:30 p.m.)  
16  
17  
18

#### CERTIFICATE

19 I, Caroline R. Castle, court reporter for the United States  
20 District Court in the Western District of Washington at Seattle,  
21 was present in court during the foregoing matter and reported  
22 said proceedings stenographically.

21 I further certify that thereafter, I, Caroline R. Castle,  
22 have caused said stenographic notes to be transcribed via  
23 computer, and that the foregoing pages are a true and accurate  
24 transcription to the best of my ability.

25 Dated this 16th day of December,



Caroline R. Castle